

No. 1046

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

NICK GURVICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

FILED
APR 25 1904

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District
Court for the District of Alaska,
Division No. 1.

See page 107

52
128

INDEX.

	Page
Arraignment	3
Assignment of Errors	9
Bill of Exceptions	19
Bond on Writ of Error	18
Bond, Supersedeas	59
Certificate, Clerk's, to Transcript	49
Citation in Error (Copy)	16
Citation in Error (Original)	52
Clerk's Certificate to Transcript	49
Exceptions, Bill of	19
Indictment	1
Judgment	7
Judgment, Motion in Arrest of.....	46
Motion for New Trial	47
Motion for New Trial, etc., Order Denying.....	7
Motion in Arrest of Judgment	46
New Trial, Motion for	47
New Trial, Order Denying Motion for.....	7
Opinion on Application of Defendant for Writ of Error and Supersedeas Bond	61
Order Allowing Writ of Error	13
Order Allowing Writ of Error	57
Order Denying Motion for New Trial, etc.	7
Petition for the Allowance of a Supersedeas and Order Granting Same	54

	Page
Petition for Writ of Error	8
Petition for Writ of Error	56
Plea	4
Supersedeas Bond	59
Testimony on Behalf of Defendant:	
Nick Gurvich	21
Nick Gurvich (cross-examination)	23
Nick Gurvich (redirect examination)	36
Nick Gurvich (recross-examination)	36
Trial	4
Trial (Continued)	5
Verdict	6
Writ of Error and Supersedeas Bond, Opinion on Application of Defendant for	61
Writ of Error, Bond on	18
Writ of Error (Copy)	14
Writ of Error, Order Allowing	13
Writ of Error, Order Allowing	57
Writ of Error (Original)	50
Writ of Error, Petition for	8
Writ of Error, Petition for	56

United States of America, }
District of Alaska. } ss.

Pleas and proceedings began and held in a criminal cause, at a regular term of the United States District Court for Alaska, Division No. 1, beginning on the 7th day of December, A. D. 1903, and ending on the 2d day of March, 1904.

Present: The Honorable M. C. BROWN, Judge.

The Honorable J. M. SHOUP, Marshal.

The Honorable W. J. HILLS, Clerk.

On the 12th day of January, 1904, the Grand Jury returned into open court the following indictment, to wit:

In the District Court of the United States of America, District of Alaska.

THE UNITED STATES }
vs. } Section 466, Penal Code.
NICK GURVICH. }

Indictment.

At the December term of the District Court of the United States of America, within and for the District of Alaska, Division No. 1, thereof, in the year of our Lord one thousand nine hundred and three, begun and held at Juneau, in said District, beginning December 7th, 1903.

The Grand Jurors of the United States of America, selected, impaneled, sworn and charged within and for the District of Alaska, accuse Nick Gurvich by this indictment of the crime of selling liquor to minors committed as follows:

The said Nick Gurvich at or near Douglas within the said District of Alaska, Division No. 1 thereof, and within the jurisdiction of this Court, on the 2d day of January, and at divers other times, in the year of our Lord one thousand nine hundred and four did knowingly, willfully and unlawfully, after having obtained a license to retail intoxicating liquors at Douglas within the District, of Alaska, Division No. 1, and within the jurisdiction of this Court, and then holding barroom license No. 93D issued on the 12th day of August, 1903, for the period of one year, sell, give and dispose of certain intoxicating liquors to certain minors then and there being named as follows: Bernie Noonan, Frank Insley, and other minors to the Grand Jury unknown. And so the Grand Jurors duly selected, impaneled, sworn and charged as aforesaid, upon their oaths do say: That Nick Gurvich did then and there commit the crime of selling liquor to minors in the manner and form aforesaid, contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the United States of America.

JOHN J. BOYCE,

United States District Attorney.

[Endorsed]: "Original. No. 414B. United States of America vs. Nick Gurvich. Indictment for Selling

Liquors to Minors. A True Bill. A. S. Dautrick, Foreman of Grand Jury. Witnesses Examined Before the Grand Jury. John Diggs, Geo. Kennedy, John Penglase, Samuel Keist, Charles Johnson, W. W. Casey, Frank V. Insley, Mervie Huff, Berney Noonan, Joe Coggins. John J. Boyce, U. S. District Attorney. Filed Jan. 12, 1904 W. J. Hills, Clerk. By _____, Deputy."

On the 14th day of January, 1904, the following proceedings were had and entered of record, to wit:

UNITED STATES	}	No. 414-B.
vs.		
NICK GURVICH.		

Arraignment.

Now, on this day came the United States Attorney; came also the defendant in person, and being represented by his attorneys, Malony & Cobb, and after the reading of the indictment herein, a copy being served upon defendant, defendant was asked by the Court if he is indicted by his true name and replies that he is, and upon application of counsel for defendant, defendant is granted time in which to plead.

On the 16th day of January, 1904, the following proceedings were had and entered of record, to wit:

UNITED STATES	}	No. 414-B.
vs.		
NICK GURVICH.		

Plea.

Now, on this day came the United States Attorney; came also, the defendant and his attorneys, Malony & Cobb. And having been arraigned on a prior day of this term, defendant is asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, namely, that of selling liquor to minors, to which the defendant says he is not guilty and therefore puts himself upon the country, and the United States Attorney for and on behalf of the Government doth the same, and this cause is set down for trial, on January 25th, 1904, to follow the trial of cause No. 413-B.

On January 28th, 1904, the following proceedings were had and entered of record, to wit:

UNITED STATES	}	No. 414-B.
vs.		
NICK GURVICH.		

Trial.

Now, on this day came the United States Attorney; came also the defendant in person, and being represented by his attorneys, Malony & Cobb, and announcing ready for trial. Thereupon the following men were

selected as jurors to try the issue in this cause: N. Carperson, C. J. Scuse, L. Van Len, John Miller, and E. Korman.

After which the jury having been duly sworn, the following witnesses were called upon to testify in behalf of the prosecution; W. J. Hills, J. M. McDonald, John Penglase, F. Insley, M. Huff, George Kennedy, B. Noonan, C. Johnson, M. Kelly, Sam Keist, W. Casey and Joe Coggins.

Whereupon plaintiff rests its cause, and counsel for defendant present their motion for the court to direct the jury to return a verdict of not guilty, and after argument had and the Court being fully advised in the premises, denies said motion, to which order and ruling of the Court counsel for defendant excepts.

On January 29th, 1904, the following further proceedings were had and entered of record, to wit:

UNITED STATES }
vs. } No. 414-B.
NICK GURVICH. }

Trial (Continued).

Now, on this day come the United States Attorney; came also the defendant and his counsel and likewise the jury heretofore impaneled and sworn, and each answering to his name, the trial of the cause proceeded with:

Whereupon, the defendant and M. J. O'Conner are sworn and testified in behalf of the defendant, whereupon defendant rests his cause; and after argument had and the jury being instructed as to the law in the premises by the Court, retire in charge of their sworn bailiff for deliberation and thereafter return into Court with their verdict, which is in words and figures as follows:

The United States of America, }
 District of Alaska. }

*In the District Court of the United States for the District of
 Alaska.*

THE UNITED STATES OF AMERICA, }

vs.

} December Term,
 1903.

NICK GURVICH.

Verdict.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment.

N. CARPERSON,

Foreman.

Dated Juneau, Jany. 29, 1904.

Which verdict was ordered entered and filed; whereupon the jury was discharged from further consideration of this cause.

On February 23d, 1904, the following further proceedings were had and entered of record, to wit:

UNITED STATES }
vs. } No. 414-B.
NICK GURVICH. }

Order Denying Motion for New Trial, etc.

Now, on this day this cause came on to be heard upon the motion of defendant for a new trial, and motion for arrest of judgment, and after argument had, the Court being fully advised in the premises, denies both said motions; to which order and ruling of the Court defendant by counsel excepts.

On February 24th, 1904, the following further proceedings were had and entered of record, to wit:

UNITED STATES }
vs. } No. 414-B.
NICK GURVICH. }

Judgment.

And now on this day came the United States Attorney; came also the defendant in person, and being represented by his attorneys, Malony & Cobb, and defendant having on a former day of this term been by a jury convicted of the crime of selling liquor to minors, and having been given notice of time of sentence, and being now asked by the Court if he has anything to say why the judgment of the Court should not be pronounced against him, and giving no valid and sufficient excuse

therefor; it is therefore the judgment and sentence of the Court that barroom license No. 93-D issued on August 12th, 1903, to conduct a barroom at Douglas, Alaska, for one year from July 1st, 1903, by said Gurvich, be and the same is hereby declared null and void, and that the license fee for the unexpired term of said license be forfeited, and that you, Nick Gurvich, pay all costs incurred in the prosecution of this cause, to which order and judgment of the Court defendant by counsel excepts, and upon application of counsel for defendant, defendant is given thirty days in which to prepare and file his bill of exceptions herein.

On the 1st day of March, 1904, the defendant filed his petition for a writ of error, which is as follows, to wit:

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant.

No. 414-B.

Petition for Writ of Error.

Nick Gurvich, defendant in the above-entitled cause, feeling himself aggrieved by the verdict of the jury, and the judgment entered on the 24th day of February, 1904, comes now by Malony & Cobb, his attorneys, and presents herewith his assignments of error and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, for the Ninth Circuit,

under and according to the laws of the United States, in that behalf made and provided, and also that order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court, be stayed and suspended until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray. ;

MALONY & COBB,

Attorneys for Defendant.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1 at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Petition for Writ of Error. Filed March 1, 1904. W. J. Hills, Clerk. By _____, Deputy. Malony & Cobb, Attorneys for Deft. ;

At the same time, defendant filed his assignment of errors which is as follows, to wit: ;

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant. ;

} No. 414-B.

Assignment of Errors.

Now comes the defendant and assigns the following errors committed by the Court upon the trial of the

above-entitled cause, and upon which he will rely upon the hearing of the case in the Appellate Court.

First.—The Court erred in compelling the defendant to go to trial, over his objections before a jury composed of only six jurors instead of twelve.

Second.—The Court erred in overruling the defendant's motion in arrest of judgment.

Third.—The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

“Gentlemen of the Jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed, or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty.”

Fourth.—The Court erred in instructing the jury as follows:

“This being accepted as the burden placed upon the prosecution, it is necessary to determine the nature of the knowledge that is required under the statute affecting the sale or permission to sell, to the person described. Permit, is defined by Webster in the follow-

ing language: "to let through; to allow or suffer to be done; to tolerate or put up with." One may permit by giving express authority to another to do a particular act or he may allow or suffer the act to be done or tolerated and may knowingly do so when under obligation of law to prevent the act and takes no adequate action or means to prevent being done that which the law requires him to prevent. In other words, if a man, when required by law to refrain from doing a particular act, furnishes the means to others with which to do that act, which is forbidden by law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act."

Fifth.—The Court erred in instructing the jury as follows:

"It may be necessary for the Court to determine in this case and to instruct the jury in this behalf, whether the knowledge of the bar-keepers who were placed in this saloon for the conduct of the business and the sale of intoxicants was the knowledge of the defendant. The Court charges you that when the bar-keepers of the defendant were selling liquor to minors and others they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian Saloon after the license was granted were sales either lawful or otherwise, under said license, and if made in violation of its terms such act or sale or giving away intoxicants was unlawful and the act of the bar-keeper, the

agent, was the act of the principal and in my opinion under the peculiar language of the statutes of Alaska, the knowledge of the agents or bar-keepers was the knowledge of the principal.”

And for the said errors, defendant prays that said cause be reversed and a new trial granted.

MALONY & COBB,
Attorneys for Defendant.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1 at Juneau. The United States, plaintiff, vs. Nick Gurvich, Defendant. Assignment of Errors. Filed March 1st, 1904. W. J. Hills, Clerk. By _____, Deputy. Malony & Cobb, Attorneys for Deft.

Service of the above and foregoing assignment of errors is admitted to have been duly made this 26th day of February, 1904.

_____,
U. S. District Attorney for the Dist. of Alaska, Division
No. 1.

On the 1st day of March, 1904, the Court made the following order, which was entered of record, to wit:
At a Stated Term, to wit, the December Term, 1903, of the United States District Court for the District of Alaska, Division No. 1, Held at the Courtroom in the City of Juneau, Alaska, on the 1st Day of March, 1904. Present, the Honorable M. C. BROWN, District Judge.

THE UNITED STATES, }
vs. }
NICK GURVICH, }

Order Allowing Writ of Error.

Upon motion of Malony & Cobb, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered herein; but the Court declines to fix the amount of bond on such writ or to approve any bond to operate as a supersedeas to the judgment herein. And the defendant is allowed twenty days to present his application for supersedeas to the Honorable the Circuit Court of Appeals, and shall serve notice of such application on the United States District Attorney.

M. C. BROWN,
Judge.

On the 1st day of March, 1904, a writ of error was sued out, and served, which, with the proof of service thereon is as follows:

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant.

No. 414-B.

Writ of Error (Copy).

The President of the United States to the Honorable,
 the Judge of the District Court of the United States
 for the District of Alaska, Division No. 1, Greeting:

Because in the record and proceedings as also in the
 rendition of a judgment of a plea which is in the said
 District Court before you, or some of you, between Nick
 Gurvich, plaintiff in error, and the United States, de-
 fendant in error, a manifest error hath happened, to
 the great damage of the said Nick Gurvich, plaintiff in
 error, as by his complaint appears:

We being willing that error, if any hath been, should
 be duly corrected, and full and speedy justice done to
 the parties aforesaid in this behalf, do command you,
 if judgment be therein given, that then under your seal,
 distinctly and openly, you send the record and proceed-
 ings aforesaid, with all things concerning the same, to
 the United States Circuit Court of Appeals for the
 Ninth Circuit, together with this writ, so that you have
 the same at the city of San Francisco, State of Califor-
 nia, on the 31st day of March, next, in the said Circuit
 31st day of aMrch, next, in the said Circuit Court of Ap-
 Court of Appeals, to be then and there held, that the rec-
 ord and proceedings aforesaid, being inspected, the said

Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 1st day of March in the year of our Lord one thousand nine hundred and four.

[Seal] W. J. HILLS,
Clerk of the United States District Court for the District of Alaska, Division No. 1.

By J. J. Clarke,
Deputy.

Allowed by:

M. C. BROWN,
District Judge.

Service of the above and foregoing writ of error and receipt of a copy thereof is hereby admitted this 1st day of March, 1904.

JOHN J. BOYCE,

United States District Attorney for Alaska, Division No. 1.

[Endorsed]: Original. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Writ of Error. Filed March 1, 1904. W. J. Hills, Clerk. By _____, Deputy. Malony & Cobb, Attorneys for Deft.

On the same day, a citation was issued, returned and filed, which, with acceptance of service thereon, is as follows, to wit:

THE UNITED STATES,	}	No. 414-B.
vs.		
NICK GURVICH,		
Defendant.		

Citation in Error (Copy).

The United States of America—ss.

The President of the United States to the United States,
and to the Honorable John J. Boyce, United States
District Attorney for Alaska, Division No. 1, Greet-
ing:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the United States District Court for Alaska, Division No. 1, wherein Nick Gurvich is plaintiff in error and the United States are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER,
Chief Justice of the Supreme Court of the United
States, this 1st day of March, A. D. 1904, and of the In-
dependence of the United States, the one hundred and
twenty-eighth.

M. C. BROWN,
Judge of the United States District Court for Alaska,
Division No. 1.

[Seal]

Attest: W. J. HILLS,
Clerk.

By J. J. Clarke,
Deputy.

Service by copy of the above and foregoing citation in
error is admitted to have been made this 1st day of
March, 1904.

JOHN J. BOYCE,
U. S. District Attorney for Alaska, Division No. 1.

[Endorsed]: Original. No. 414-B. In the United
States District Court for Alaska, Division No. 1, at Ju-
neau. The United States, Plaintiff, vs. Nick Gurvich,
Defendant. Citation in Error. Filed March 1, 1904.
W. J. Hills, Clerk. By ———, Deputy. Malony &
Cobb, Attorneys for Deft.

On the 2d day of March, 1904, the defendant filed a
cost bond, which is in words and figures as follows, to
wit:

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant.)

No. 414-B.

Bond on Writ of Error.

Know all men by these presents, that we, Nick Gurvich, as principal, and A. Kengyol and George Kyage, as sureties, are held and firmly bound unto the United States of America, plaintiffs above named in the sum of two hundred and fifty dollars, to be paid to the said United States of America, their successors and assigns to which payment well and truly to be made, we hereby bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, and assigns, firmly by these presents.

Sealed with our seals, and dated this 1st day of March, A. D. 1904.

Whereas, the above-named Nick Gurvich has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the United States District Court for the District of Alaska, rendered on the 24th day of February, 1904.

Now, therefore, the condition of the above obligation is such that if the above-named Nick Gurvich shall prosecute said writ of error to effect, and abide the decision of the Appellate Court, and pay all costs that may be adjudged against him, if he shall fail to make good his

plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Nike GURVICH.

A. KENGYOL.

GEORGE KYAGE.

Approved this 2d day of March, 1904, to operate only as a cost bond.

M. C. BROWN,

Judge.

[Endorsed]: Original. No. 414-B. In the United States District Court for the District of Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Bond on Writ of Error. Filed March 2d, 1904. W. J. Hills, Clerk. By _____, Deputy. Malony & Cobb, Attorneys for Deft.

On the 4th day of March, 1904, defendant filed his bill of exceptions, which is as follows, to wit:

THE UNITED STATES,

vs.

NICK GURVICH,

Plaintiff,

Defendant.

No. 414-B.

Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause, the following proceedings were had, to wit:

First Exception.—Six jurors having been drawn from the box, examined on their voir dire, found qualified,

and accepted by both parties, the Court ordered said six jurors to be sworn, as the jury to try the case; whereupon the defendant objected to being placed upon trial before a jury composed of only six jurors, on the ground that the same was not a legal jury, and demanded a jury of twelve; and the Court overruled said objections and compelled defendant to go to trial before a jury composed of only six jurors; to which ruling of the Court the defendant then and there excepted.

And thereupon, to maintain the issues on their part, the plaintiffs introduced testimony tending to prove that the defendant, Nick Gurvich, was the holder of barroom license No. 93-D, issued on the 12th day of August, 1903, and running for the period of one year from July 1st, 1903. That under said license, he was the proprietor of a saloon on Douglas Island, Alaska, known as the Slavonian saloon. That the defendant himself never tended bar; he had two bar-keepers employed who attended the bar. Defendant was city marshal of Treadwell City, an adjoining town, and lived there. He visited his saloon daily, counted the cash, ordered goods, and exercised full control and direction over the business, usually spending about an hour daily at the saloon. In the months of July, August, September, October, November and December, 1903, sales of intoxicating liquors were made by the bar-keepers to the minors, Bernie Noonan, Frank Insley, and other minors. This occurred on six or seven different occasions. The bar-keepers knew that the said persons were minors at the time of the sales.

(Testimony of Nick Gurvich.)

And the defendant, to maintain the issues on his part, was sworn as a witness and testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. Nick Gurvich.

Q. Are you the defendant in this case?

A. Yes, I am.

Q. Where do you reside?

A. Treadwell City.

Q. Have you any occupation there, what is your business down at Treadwell?

A. I am marshal there.

Q. City marshal? A. Yes.

Q. Just explain to the jury—you are proprietor of the Slavonian Saloon? A. I am.

Q. Just explain what you do with reference to the saloon, how you run it, do you tend bar there yourself?

A. No, sir; I never do.

Q. What supervision do you keep over it?

A. I just go over there to see that everything runs right.

Q. You instruct your bar-keepers?

(Objected to as leading. Question withdrawn.)

Q. Just explain to the jury, Mr. Gurvich, how you run the saloon, your supervision over it, etc.?

A. Well, I run the saloon like all the rest of the boys and try keep everything all right and tell the bar-keepers to sell things to right people, that is all.

(Testimony of Nick Gurvich.)

Q. State whether or not you knew that any liquors were being sold to minors? }

A. I say to bar-keepers not be selling that way at all. }

Q. You instructed them not to sell to minors or other forbidden persons? A. Yes.

(Counsel for the United States objects to counsel for defendant explaining what the witness means.)

By the COURT.—The witness does not speak very clearly.

(By Mr. COBB.)

Q. Do you remember the time Mr. McDonald, the marshal of Douglas, came to you and stated that he had been informed by the Commissioner that boys had been getting liquor there? A. I am.

Q. You remember that? A. Yes.

Q. What did you do with reference to stopping it?

A. When he tell me I says, "All right, I stop it," and I go to bar-tender and I tell them, both of them.

Q. Has any further complaint ever been made to you since then?

A. No, before the marshal came over.

Q. None before that either? A. No.

Q. That is the only complaint made?

A. That is all to me.

Q. After that you gave further directions to the bar-tenders to stop it? A. That is what I do.

(Testimony of Nick Gurvich.)

Q. State whether or not you ever did consent to the sale of liquor there by the bar-keepers to minors?

A. No, I never.

Q. How much are you about the saloon, are you there constantly, just tell how much you are around?

A. What you mean?

Q. Explain to the jury how much you are about the saloon; are you there all the time?

A. No, I am about a hour every day.

Q. How long do you stay?

A. An hour and a half, sometimes.

Q. What for?

A. See how the register going and other things.

Q. Then what do you do?

A. Go to Treadwell and work; I stay there and sleep there; my family there.

Cross-examination.

(By Mr. BOYCE.)

Q. You say you live at Treadwell? A. Yes.

Q. How long have you lived there?

A. Pretty near, or a little over, five months.

Q. That is since last August or September?

A. Since last August.

Q. Did you go there when you became marshal?

A. I am, yes.

Q. When was you made marshal there?

A. Since that day.

Q. What day was that?

(Testimony of Nick Gurvich.)

A. I don't know what day, sometime in July, I believe, I ain't sure, I believe the 24th of July.

Q. Where did you live before that?

A. In Douglas.

Q. How long did you live in Douglas?

A. Pretty near two years.

Q. How long have you been in the saloon business?

A. About a year and a half.

Q. About a year and a half?

A. About a year now, day after to-morrow a year.

Q. The first of February last year you began the saloon business? A. I am.

Q. Did you then run the Slavonian saloon?

A. I am.

Q. Did you tend bar there at that time?

A. No, sir.

Q. Did you ever tend bar there? A. No, sir.

Q. You applied for this license, didn't you?

A. Yes.

Q. I show you Plaintiff's Exhibit No. 3—I will show you your application, is that your signature?

A. Yes, that is mine.

Q. You swore to that before Mr. Clarke?

A. Yes.

(Objected to as not proper cross-examination.)

By the COURT.—It goes directly to the explanation made by the witness in his defense as to the measure of responsibility for this matter and his supervision

(Testimony of Nick Gurvich.)

there. He just stated the amount of supervision he has given it; whether that is such supervision as the law requires the law will settle.

(After argument.)

(By Br. BOYCE.)

Q. Well, I will withdraw that question and proceed with other questions directly connected with the cross-examination.

By the COURT.—I am not sure but what you are entitled to that question as growing out of his declaration as to proprietorship.

(By Mr. BOYCE.)

Q. I will ask you, Mr. Gurvich—you stated that you was the proprietor of the Slavonian Saloon?

A. Yes.

Q. What do you mean by that?

A. What I mean by that? Well, I got everything belongs to me there except the house.

Q. What? A. The building.

Q. All the fixtures in the saloon belong to you?

A. Yes.

Q. Are you the licensee, did you get the license from the Government? A. I did, sir.

Q. Did you get it in your own name?

A. Yes, I did, sir.

Q. Is anyone else interested in that license?

(Objected to as not proper cross-examination, irrelevant and immaterial.)

(Testimony of Nick Gurvich.)

By the COURT.—The question of proprietorship raises the question as to whether anyone else is interested. I suppose, in fact, that that is the last thing the government would want to show.

By Mr. BOYCE.—The defendant has stated that he was the proprietor and made some declaration as to being down there to look after the register and my purpose is to show the attitude he bore toward this saloon and his knowledge of the men he engaged there and the manner in which they were engaged there, etc.

By the COURT.—Everything that he did, growing out of his proprietorship and supervision is competent to inquire into, but asking whether there were other proprietors would be—

By Mr. BOYCE.—He has stated he was the sole proprietor; I asked whether there was anyone else interested in the business.

By the COURT.—You may ask that question.

(By Mr. BOYCE.)

Q. Were there any others interested in that business beside yourself? A. No, sir.

Q. Do you know Pete Gilovich?

A. I do, sir. He is working for me there.

Q. Working for you? A. He is a Slavonian.

Q. He is not an American? A. Yes.

Q. Who is Archie Belich?

A. He is working for me, he is my cousin.

Q. What does he do? A. He tends bar.

(Testimony of Nick Gurvich.)

Q. Do Archie and Pete tend bar all the time, conducting the business? A. Yes.

Q. How long have they been in that business?

A. Who you mean, them two?

Q. Archie and Pete? A. Since I been there.

Q. Then they were there before this license was taken out? A. Before this last license, you mean?

Q. Yes. A. Yes.

Q. The license which was taken out the 1st of July?

A. Yes, he was there before I took this.

Q. How long have you known them?

A. I know Archie since he was born, and I know Pete about ten years ago.

Q. Now, when the city marshal, McDonald, came to you and made complaint about selling liquor to boys, what did you do in the matter?

A. I answered McDonald I go stop that and I go to bar-tenders and tell about it

Q. What bar-tenders did you go to?

A. Both of them.

Q. What did you say to Archie?

A. I say to Archie, you stop that if you done it, you no sell any more.

Q. What did you say to Pete?

A. Same thing.

Q. What time did McDonald tell you this?

A. About six o'clock in the evening.

Q. How long ago? A. Pretty near two months.

(Testimony of Nick Gurvich.)

Q. Before that time had you ever heard anything about boys getting whisky at the Slavonian saloon?

A. No, sir.

Q. Or beer at the Slavonian saloon?

A. Except one.

Q. One? A. Except one.

Q. Who was that one? A. Birnie.

Q. Birnie who? A. Birnie Noonan.

Q. How long ago had you heard about his getting it there?

A. Pretty near since I was there he was getting it for his father all the time; not all the time, every month.

Q. Every pay day?

A. I don't know about pay day, any time he came there we sent to his father when he say so, when the old man say so.

Q. Did the old man speak to you about it?

A. Yes.

Q. How long before that? A. Long time.

Q. When McDonald came to you?

A. He speak to me pretty near a year ago.

Q. Then Birnie had been getting liquor there for about a year?

A. I don't know about a year, eleven months.

Q. Did you speak to your bar-keepers about it?

A. I did, sir.

Q. You knew what provision was in this license, didn't you—you have a license like this, haven't you?

A. Yes, I have.

(Testimony of Nick Gurvich.)

Q. Stating that no liquor should be sold to minors under this license? A. Yes.

Q. You knew that when you got it?

A. Yes.

Q. You knew that when you applied for the license in July, did you call the attention of Archie and Pete to it? A. To what?

Q. Tell them that the license would not permit any selling to minors? A. Yes, I did.

Q. When? A. As soon as we got the license.

Q. You told them that, did you? A. Yes.

Q. Now, what steps did you take after you heard that the boys had been getting liquor there, to stop it?

A. Well, I tell them I never heard before McDonald tell me and after McDonald tell me I speak to them and tell them to stop it; that is all.

Q. Then, before that time, you say your habit of going to the saloon, when did you go there?

A. Any time I feel like it.

Q. So you had no fixed time to go? A. No.

Q. You went some time every day?

A. Well, yes; every day.

Q. In the day time, or night?

A. Sometime daytime and sometime night-time.

Q. You went there for the purpose of examining the cash, didn't you? A.

A. Yes, and look after everything.

Q. To see what stock was out and what stock to order? A. Yes.

(Testimony of Nick Gurvich.)

Q. You ordered the stock? A. Yes.

Q. And paid the bills? A. I do, sir.

Q. You went there simply to find out whether the cash register checked up with the cash on hand and what stock was short and what you had to buy?

A. Yes.

Q. And that is all the supervision you gave it, isn't it? A. Well, that's all; yes.

Q. Now, when Mr. McDonald told you that these boys had been in the habit of buying liquor there, the only thing you did was to speak to the bar-keepers about it? A. That's all.

Q. Did he tell you he had spoken to the bar-keepers himself about it? A. I don't remember.

Q. Did he tell you he had warned Pete and also warned Archie and given them notice?

A. He never said anything to me only says you stop it—a complaint against you.

Q. He stopped it? A. Yes.

Q. And when you went to the bar-keepers and told them to stop it that was the end of your supervision?

A. Yes.

Q. You didn't do anything more than that?

A. No.

Q. You understood that when you got this license, you had to be responsible for all that was done on the premises, didn't you?

(Objected to as not proper cross-examination.)

87

(Testimony of Nick Gurvich.)

By the COURT.—You say he was responsible for all that was done on the premises; that would refer to parties that had no connection with the premises whatever. That is all the objection I see to it.

(By Mr. BOYCE.)

Q. Did you understand that you was responsible for men that you kept there as bar-keepers in the sale of liquor? A. Yes.

Q. You did understand that? A. Yes.

Q. Then when McDonald spoke to you and said that these men had been selling to boys and minors you recognized that you were interested in the matter?

A. Yes.

Q. And all that you did was to go and tell them that they must not do it? A. That's what I did.

Q. Do you know—you went there at all hours, you say, day or night—at any time during the day or night you dropped in—any time? A. Yes.

Q. The saloon was open all day and all night, wasn't it? A. Yes, except Sunday, sometime.

Q. It was an all-night house? A. Yes.

Q. You didn't close up at night any time?

A. No.

Q. You know some of these boys that have given evidence in this case, don't you? A. I do, yes.

Q. You have seen some of these boys on the premises, have you not? A. On what?

Q. There at the Slavonian saloon?

(Testimony of Nick Gurvich.)

A. No, I didn't.

Q. Never saw one of them there?

A. I saw only one; he bring some grocery for me there; we cook in there, you see.

Q. Who was he, what was his name?

A. I don't know.

Q. You say when he brought groceries—did you ever see him get a drink? A. No.

Q. You never gave him a drink? A. No.

Q. Do you ever serve behind the bar at all?

A. I go behind the bar.

Q. Do you ever serve drinks there at all?

A. No.

Q. Do you serve customers when they come up to the bar?

A. Sometimes when I go in there I have a drink and somebody else have a drink. That happens once or twice; treat.

Q. Does anybody ever call for a beer when you are behind the bar? A. No.

Q. You mean when you say "treat," anybody coming in there you take a drink and treat? A. Yes.

Q. Do you ever treat over the bar?

A. Not much.

Q. You go outside? A. Yes.

Q. The only time you take a drink behind the bar there is when somebody invites you?

A. If I feel like it.

Q. But you don't act as a salesman or a bar-keeper?

(Testimony of Nick Gurvich.)

A. No, sir.

Q. And the entire business of selling the liquor was conducted by Archie and Pete? A. Yes.

Q. All the sales were made by them and not by you?

A. Well, how you mean by me?

Q. The sales, selling to customers in front of the bar retailing liquor, waiting on customers? A. Yes.

Q. You had known them for a long time when you put them in charge?

A. Yes, I know them a long time.

Q. Do you mean to say they are not interested with you there and own no part of the proceeds of that property? A. Who do you mean?

Q. Archie and Pete?

A. No, except I pay them wages.

Q. They have no interest in the business?

A. No.

Q. They are not your partners? A. No.

Q. They are your servants and act for you and you pay them wages, so much a month? A. Yes.

Q. That is all? A. Yes.

Q. Your principal interest in the business was as you testified in your direct examination to see how the register goes—what do you mean by that?

A. I mean how much we cash in.

Q. How much profit was being made in the business? A. Yes.

Q. You carried on the business as an investment?

A. Yes.

(Testimony of Nick Gurrvich.)

Q. As city marshal at Treadwell, did you look after minors visiting saloons there?

(Objected to as not cross-examination, immaterial and irrelevant for this reason: It is simply shown on examination in chief of the witness, that the witness was city marshal there for the purpose of showing what position he had. In the question that is directed to him in cross-examination is whether he did or did not look after the visits of minors at Treadwell to the saloons).

By the COURT.—The objection is that it is irrelevant and immaterial?

By Mr. COBB.—And not proper cross-examination.

By the COURT.—It might be cross-examination, but it has no relevancy as to what he did as marshal. I should say it would be a waste of time to inquire into it.

(By Mr. BOYCE.)

Q. As city marshal of Treadwell, you were familiar with the conditions over at Treadwell and also over at Douglas?

A. No, I got nothing at Douglas except the saloon.

Q. Where do you live? A. Treadwell.

Q. You have a saloon in Douglas? A. I have.

Q. You go there every day? A. Yes.

Q. You go to your saloon every day? A. Yes.

Q. Do you go to Douglas and into your saloon and then leave Douglas? A. Yes.

Q. You are never there except for that purpose?

A. Yes, I sometimes need something and buy it.

(Testimony of Nick Gurvich.)

Q. You buy there? A. Yes, what I need.

Q. Are you familiar with the conditions there?

A. Yes.

Q. Did you ever hear of the boys buying liquor or getting drunk at the Slavonian saloon in Douglas?

(Objected to as having been gone into.)

By the COURT.—It has not been gone into. The objection is overruled. Exception.

A. No, sir, I didn't.

Q. Never did? A. Never did.

Q. You have been there all this time carrying on the business there and never heard of it?

A. Never heard of it.

Q. Did you do anything to superintend the management of that business except what you have stated? Do you understand the question?

A. Yes, I told you no. I do everything there, give orders and tell the boys what to do and tell them how to sweep out and everything.

Q. Tell them how to sweep out?

A. Yes, and everything.

Q. You have told everything you did—all the superintendency of the business that you have is that you are there an hour a day?

A. Yes, and sometimes an hour and a half.

Q. Sometimes an hour and a half and sometimes don't stay at all.

Q. Yes. You took what was coming to you—take it home? A. No.

(Testimony of Nick Gurvich.)

Q. It don't make any difference where you take it, but you take it from the building? A. Yes.

Q. And you make the change, etc., put in there what they need? A. Yes.

Q. And that is all you do with reference to superintending the business, isn't it? A. Yes.

Redirect Examination.

(By Mr. COBB.)

Q. With regard to Birnie Noonan, you say he has been the habit of coming there off and on to get liquor for eleven months? A. Pretty near, yes.

Q. He never paid for it? State how you came to let him have it?

A. His father came to me, tell me anything he ask me for to put it in a sack or any other way to carry to his home.

Q. To carry to his father?

A. Yes, his father pay for that all the time.

Recross-examination.

(By Mr. BOYCE.)

Q. You say his father paid for it all the time?

A. Yes.

Q. Do you know that all the liquor that was peddled out to Bernie Noonan from the bar of the Slavonian saloon was paid for by his father?

A. All he gets there.

Q. How do you know that?

A. The boys tell me.

(Testimony of Nick Gurvich.)

Q. You don't know anything about it?

A. I do, I see it on a book and when he pay we scratch it out.

Q. Do you see Birnie Noonan every time he comes into the saloon and gets beer and whisky? A. No.

Q. You don't know of your own knowledge whether he came in and bought beer on his own hook and paid for it, do you? A. No, sir.

Q. The direction you gave to the bar-keepers there was to give him such liquor as his father wanted?

A. Yes.

Q. He paid nothing over the bar? A. No.

Q. That was paid for by his father? A. Yes.

Q. Any other transactions you don't know anything about? A. No.

Q. Did you ever tell the bar-keepers not to deliver liquor for himself to Birnie Noonan until you was notified by the marshal? A. I didn't.

Q. And it was going on for nine months—two months ago the marshal notified you—and eleven months ago Birnie Noonan commenced to get liquor there?

A. Yes.

Q. Who is Mr. Thomas Noonan?

A. He is the foreman of the Treadwell mine.

It is agreed to be admitted by counsel for the Government that Mr. Thomas Noonan would testify that he told the defendant that if Birnie came there to get liquor to let him have it and it was for him and to let him have it,

By Mr. BOYCE.—We will admit that.

By the COURT.—It may be taken as testimony.

Second Exception.—And thereupon the defendant, before the argument began, prayed the Court in writing to instruct the jury as follows:

“Gentlemen of the Jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer’s directions, either expressed, or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant’s employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty.”

But the Court refused to so instruct the jury, to which ruling of the Court the defendant then and there excepted.

And thereupon the Court instructed the jury as follows:

INSTRUCTIONS OF THE COURT.

Gentlemen of the Jury, the indictment under which the defendant is now being tried, charges in substance that Nick Gurvich, at or near Douglas, within said District of Alaska, Division No. One, and within the jurisdiction of this Court, on the second day of January, in the year of our Lord, one thousand nine hundred

and four, and on various other days, did knowingly, willfully and unlawfully after having obtained a license to retail liquors at Douglas within the District aforesaid, and while holding bar-room license No. 93-D, issued on the 12th day of August, 1903, for the period of one year, sell, give and dispose of certain intoxicating liquors to certain minors there, being named as follows: Birnie Noonan, Frank Insley, and other minors to the grand jury unknown. In other words, the indictment charges that the defendant did knowingly, willfully and unlawfully sell, give and dispose intoxicating liquors to minors named Birnie Noonan, Frank Insley, and other minors to the grand jury unknown.

The statute, or so much thereof as this indictment seems to have been brought under is part of section 478, of the code, which reads as follows: "And no licensee in any place shall knowingly sell or permit to be sold in his establishment any intoxicating liquor of any kind to any person under the age of 21 years."

The word "knowingly," used in the statute above referred to and in the indictment does not refer to selling liquor, because the licensee having taken out his license is authorized under the law to sell liquor to persons generally, but not to persons under 21 years of age; the word "knowingly," then refers to the persons to whom the liquor was sold; namely, knowing the person to be under 21 years of age.

In order to convict under this indictment it is necessary to show that the liquor or intoxicants was sold or permitted to be sold with knowledge that the person

to whom sold or given or permitted to be sold or given was under 21 years of age.

Third Exception.—And continuing his instructions, the Court further charged the jury:

“This being accepted as the burden placed upon the prosecution it is necessary to determine the nature of the knowledge that is required under the statute affecting the sale or permission to sell, to the person described. Permit, is defined by Webster in the following language; ‘to let through; to allow or suffer to be done; to tolerate or put up with.’ One may permit by giving express authority to another to do a particular act or he may allow or suffer the act to be done or tolerated and may knowingly do so when under obligation of law to prevent the act and takes no adequate action or means to prevent being done that which the law requires him to prevent. In other words, if a man when required by law to refrain from doing a particular act, furnishes the means to others with which to do that act which is forbidden by law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act.”

To which said instruction, the defendant then and there excepted, on the grounds—First: Said instruction placed upon the defendant an active duty, to guard against the violation of the law by its employees, which is not required by law. Second: It made the defendant criminally liable unless he absolutely prevented his

employees from selling to minors, which is not the law. Continuing his instructions, the Court further said:

“Ordinarily, in criminal law a man is not responsible criminally for the acts of his employees, unless the act of the employees was done with the knowledge and consent of the employer or by the employer’s direction, either expressed or implied. In the case you are now trying, there is no proof that the defendant, himself, in person, sold any liquor to minors, but such sales, if any, were made by the defendant’s employees. Now, unless you find and believe from the evidence, beyond a reasonable doubt that the sales, if any, made by employees were made or permitted to be made by the defendant, either in express terms or implied, or with his knowledge or consent, you will find the defendant not guilty.

“The law under which the licensee carries on the business of a bar-room or retail liquor dealer requires that the licensee superintend in person the management of the business licensed. To superintend in person the business means that he shall give the same his personal attention. No one is licensed under the laws of Alaska to retail liquor except those who comply with the requirements of the statute and the several statutory provisions in making application therefor, and one of the provisions of the statute is the one above quoted, that the licensee will superintend in person the management of the business licensed.

“Persons who have violated the provisions of the statute under certain conditions are excluded from

those who can obtain a license. The personal supervision apparently required by the statute is that the licensee shall give the business his personal management, in such a way that he may know and be advised of the manner in which it is being conducted; that he must see to it by his personal presence and management that the law which permits him to barter and sell is not violated.

“The offense charged is in the nature of a misdemeanor and under our law ‘all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid or abet in its commission, they, in person are principals and to be tried and punished as such; in misdemeanors, there are no accessories, all are principals.’

“It is not proved in this case that the defendant in person did the act complained of. He says to you that the father of the boy, Noonan, requested him to let the boy have beer for him, charging it to him (the father), and to put it in a sack or in some other way, and let the boy bring it to him; and he tells you further that he allowed his bar-keepers to deliver the liquor to the boy for the father and that the father paid for it. This, in my opinion was not giving of liquor or selling liquor to the boy; but what does the defendant say in this connection as to selling or permitting to be sold or given or permitting to be given or sold, to the boy, liquor? Did he say in this connection that the sale or giving of liquor to this boy who was known to be a minor, that

the sale thereof was forbidden by him in his directions to his employees?

“I am not attempting to repeat to you the evidence of the defendant, but to call your attention to the matter testified to by him. You are to recall the exact testimony of the witness in this behalf for yourselves and determine for yourselves what was his statement and what the language used by him, and thereby determine under the obligations of the law to give his business personal supervision, whether when the boy Noonan purchased and paid for liquor himself, if you are satisfied beyond a reasonable doubt that he did purchase and pay for liquor for himself and for his own use, whether the defendant knowingly permitted it to be done.

“The jury are instructed that in determining what facts are proved in this case they should carefully consider all of the evidence given before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proved which they think may be reasonably and rightfully inferred from the evidence given in the case, although there may be no direct testimony as to such fact.”

Fourth Exception.—The Court then further instructed the jury as follows:

“It may be necessary for the Court to determine in this case and to instruct the jury in this behalf, whether the knowledge of the bar-keepers who were placed in this saloon for the conduct of the business and the sale of intoxicants was the knowledge of the defendant.

The Court charges you that when the bar-keepers of the defendant were selling liquor to minors and others they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian saloon after the license was granted were sales either lawful or otherwise, under said license, and if made in violation of its terms such act or sale or giving away intoxicants was unlawful and the act of the bar-keeper, the agent was the act of the principal and in my opinion under the peculiar language of the statutes of Alaska, the knowledge of the agents or bar-keepers was the knowledge of the principal.”

To which said instruction, the defendant then and there excepted on the ground that under the indictment in this case, it is not the law that the knowledge of the agents or bar-keepers is the knowledge of the principal.

The Court then further instructed the jury as follows:

“Did the bar-keepers know these boys were under 21 years of age? They were required at their peril, under the law, to know and were compelled to use their judgment as to the age of individuals when they presented themselves before them for the purpose of purchasing intoxicants. The duty was upon them to determine the fact from the circumstances as they appeared before them and the failure to make inquiry in no sense excuses their action.

All men are presumed to possess elements of common knowledge and common knowledge advises all humanity as to whether boys are under the age of 21 years when such fact comes within their personal observa-

tion. When these boys presented themselves or any one of them for the purchase of intoxicants, if their appearance was such and the jury so find beyond a reasonable doubt as to indicate to a person of ordinary capacity and knowledge that they were 15 or 16 or 17 years of age or under 21 years, then the law will infer that the person selling had that knowledge which the statute requires.

Before you can return a verdict of guilty in this case you must find that the matters charged in the indictment are proved to your satisfaction, beyond a reasonable doubt. The defendant is entitled to the general presumption of innocence and that goes with him throughout the case until overcome by evidence which satisfies you beyond a reasonable doubt of his guilt.

You will take this case under the construction of the law as the Court has given it, find your verdict under the evidence as testified to by the witnesses on the stand.

In calling attention to any evidence in the case, it is not the intention of the Court to repeat the testimony or to have you accept it from the Court; the only object of the Court in referring to the matter of testimony was to refer to the substance thereof in such a way as to direct your attention to the matter at issue under the law.

You are the exclusive judges of the credibility of witnesses and the weight to be given to their testimony."

And the above and foregoing were all the instructions given to the jury.

The jury having returned a verdict finding the defendant guilty as charged on January 30th, 1904, the defendant filed his motion in arrest of judgment, which was as follows:

UNITED STATES OF AMERICA,

vs.

NICK GURVICH,

Defendant.

No. 414-B.

Motion in Arrest of Judgment.

Now comes the defendant and moves the Court to arrest judgment herein upon the verdict of the jury.—
1st: Because said verdict is void, because rendered by an illegal jury, said jury being illegal, in that it was composed of only six persons and not twelve as required by law.

2d. Because no penalty is provided by section 478 of the Criminal Code under which this prosecution is brought, except one of forfeiture, and such penalty is illegal and forbidden by law.

MALONY & COBB,

Attorneys for Defendant.

And on the same day, the defendant filed his motion for a new trial which was as follows:

UNITED STATES OF AMERICA }
vs. }
NICK GURVICH, } No. 414-B.
Defendant. }

Motion for New Trial.

Now comes the defendant, by his attorneys, and moves the Court to set aside the verdict of the jury herein, and grant him a new trial hereof for the following reasons, to wit:

I.

Because the Court erred in overruling defendant challenge to jurors who were shown on their voir dire to have served on a regular panel of the jury within the past year, as is more fully shown in the bill of exception.

II.

The Court erred in refusing the instruction to the jury as prayed for by defendant.

III.

The Court erred in charging the jury as shown in the last exception of defendant to said charge.

IV.

The Court erred in instructing the jury in effect that it was the duty of the defendant to adopt adequate means to prevent his employees from selling liquor to minors, as pointed out in the second exception to said charge.

V.

The Court erred, in submitting to the jury the question as to whether defendant knowingly permitted the sale of liquors to minors as pointed out in the exceptions to the charge.

VI.

The Court erred in instructing the jury that knowledge of the agents of defendant was knowledge of the defendant, as is pointed out in the third exception to the charge.

VII.

The verdict of the jury is not supported by the evidence in this; that the defendant was charged in the indictment with knowingly selling, etc., and the evidence conclusively showed that he did not sell and had no knowledge of any sale made to minors by his employees.

MALONY & COBB,

Attorneys for Defendant.

Said motions came on to be heard together, and were argued by counsel, and after due deliberation had were by the Court overruled, to which ruling of the Court the defendant then and there excepted.

Now, on this 29th day of February, 1904, and during the December, 1903, term of court, because the above matters do not appear of record, I, Melville C. Brown, the Judge before whom said trial was held, do hereby approve and allow the above and foregoing bill of ex-

ceptions, and order the same to be filed as, and made a part of the record herein.

M. C. BROWN,
Judge.

O. K.—JOHN J. BOYCE,
U. S. Attorney.

Service of the above and foregoing bill of exceptions is admitted to have been duly made, this 26th day of February, 1904.

JOHN J. BOYCE,
U. S. District Attorney, for the District of Alaska, Division No. 1.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich. Defendant. Bill of Exceptions. Filed Mar. 4, 1904. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Deft.

Clerk's Certificate to Transcript.

United States of America, }
District of Alaska, } ss.
Division No. 1. }

I, W. J. Hills, clerk of the United States District Court, for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing and hereunto annexed 50 pages of typewritten matter, numbered from 1 to 50, both inclusive, constitute a full, true and correct transcript of the record on appeal in the therein

entitled cause of the United States vs. Nick Gurvich, No. 414-B, as the same appears on file and of record in my office; that the same is in command of the writ of error issued herein; that this transcript was prepared by me and the costs of said preparation and this certificate, amounting to \$23.00, has been paid to me by attorneys for appellant.

In witness whereof I have hereunto set my hand and affixed the seal of the Court, this 4th day of March, 1904.

[Seal]

W. J. HILLS,

Clerk U. S. District Court for Division No. 1, Alaska.

By J. J. Clarke,

Deputy.

*In the United States District Court for Alaska, Division
No. 1, at Juneau.*

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant.

} No. 414-B.

Writ of Error (Original).

The President of the United States to the Honorable
the Judge of the District Court of the United States
for the District of Alaska, Division No. 1, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said District Court before you, or some of you, between Nick Gurvich, plaintiff in error, and the United States, defendant in error, a manifest error hath happened, to

the great damage of the said Nick Gurvich, plaintiff in error, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, to gether with this writ, so that you have the same at the city of San Francisco, State of California, on the 31st day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and record proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 1st day of March, in the year of our Lord one thousand nine hundred and four.

[Seal]

W. J. HILLS,

Clerk of the United States District Court for the District of Alaska, Division No. 1.

By J. J. Clarke,
Deputy.

Allowed by:

M. C. BROWN,
District Judge.

Service of the above and foregoing writ of error and receipt of a copy thereof is hereby admitted this 1st day of March, 1904.

JOHN J. BOYCE,

U. S. District Attorney for Alaska, Division No. 1.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Writ of Error. Filed Mar. 1, 1904. W. J. Hills, Clerk.

*In the United States District Court for Alaska, Division
No. 1, at Juneau.*

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant.

No. 414-B.

Citation in Error (Original).

The United States of America—ss.

The President of the United States to the United States, and to the Honorable JOHN J. BOYCE, United States District Attorney for Alaska, Division No. 1, Greeting:

You hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in

the clerk's office of the United States District Court for Alaska, Division No. 1, wherein Nick Gurvich is plaintiff in error and the United States are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 1st day of March, A. D. 1904, and of the Independence of the United States, the one hundred and twenty-eighth.

M. C. BROWN,

Judge of the United States District Court for Alaska,
Division No. 1.

[Seal]

Attest: W. J. HILLS,
Clerk.

By J. J. Clarke,
Deputy.

Service by copy of the above and foregoing citation in error is admitted to have been made this 1st day of March, 1904.

JOHN J. BOYCE,

United States District Attorney for Alaska, Division
No. 1.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Citation in Error. Filed Mar. 1, 1904. W. J. Hills, Clerk.

[Endorsed]: No. 1046. United States Circuit Court of Appeals for the Ninth Circuit. Nick Gurvich, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed March 11, 1904.

F. D. MONCKTON,
Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

NICK GURVICH,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

Petition for the Allowance of a Supersedeas and Order Granting Same.

To the Honorable the Judge of said Court:

The petition of Nick Gurvich, plaintiff in error in the above cause, respectfully shows: That on the 24th day of February, 1904, in the United States District Court for Alaska, in a criminal cause wherein the United States was plaintiff and this petitioner was defendant, your petitioner was adjudged guilty and sentenced. That afterwards on March 1st, 1904, this defendant filed and presented to the judge of said District Court, his petition for a writ of error and the allowance of a su-

persedeas, a true copy of which is hereto attached and made a part hereof. That said petition was heard on said day, and the said Court allowed said writ of error, but expressly refused to fix the amount of security for a supersedeas or to allow any supersedeas to the judgment and sentence aforesaid, or in any manner to suspend the execution of such sentence and judgment pending the decision of said writ of error by this Honorable Court. That a true copy of said order is hereto attached and made a part hereof.

Your petitioner further shows that a complete transcript of the record from the said District Court, is on file in this Honorable Court, showing service of the citation, and all proper steps for the removal of said cause into this Honorable Court, and reference is here made to said transcript for all the particulars therein contained.

Your petitioner tenders herewith a bond in the sum of \$1,500, conditioned as required by law and the practice of this Court, which sum is amply sufficient to secure the defendant in error, in the event of the affirmance of said judgment by this Court.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant him a writ of supersedeas or order, suspending and staying said judgment pending the hearing of the writ of error hearing; and your petitioner will ever pray.

LORENZO S. B. SAWYER and

MALONY & COBB,

Attorneys for Plaintiff in Error.

On filing the foregoing petition and the bond therein mentioned it is ordered that said petition be and the same hereby is granted, and all proceedings upon the judgment of the lower court stayed pending the writ of error in the United States Circuit Court of Appeals.

WM. B. GILBERT,
WM. W. MORROW,
Circuit Judges.

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant.

No. 414-B.

Petition for Writ of Error.

Nick Gurvich, defendant in the above-entitled cause, feeling himself aggrieved by the verdict of the jury, and the judgment entered on the 24th day of February, 1904, comes now by Malony & Cobb, his attorneys, and presents herewith his assignments of error and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, and also that order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court, be stayed and suspended un-

til the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

MALONY & COBB,
Attorneys for Defendant.

At a stated term, to wit, the December term, 1903, of the United States District Court for the District of Alaska, Division No. 1, held at the courtroom in the City of Juneau, Alaska, on the 1st day of March, 1904. Present, the Honorable M. C. BROWN, District Judge.

THE UNITED STATES,

vs.

NICK GURVICH.

Order Allowing Writ of Error.

Upon motion of Malony & Cobb, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore rendered herein; but the Court declines to fix the amount of bond on such writ, or to approve any bond to operate as a supersedeas to the judgment herein. And the defendant is allowed twenty days to present his application for supersedeas to the Honorable the Circuit Court of Appeals for the Ninth Circuit, and shall serve notice of such ap-

plication on the United States District Attorney for Alaska.

M. C. BROWN,
Judge.

Service of a copy of the within application is admitted this 4th day of March, 1904.

JOHN J. BOYCE,

U. S. District Attorney for Alaska, Division No. 1.

[Endorsed]: No. 1046. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Nick Gurvich, Plaintiff in Error, vs. The United States, Defendant in Error. Petition for the Allowance of a Supersedeas. Filed Mar. 17, 1904. F. D. Monckton, Clerk.

In the United States District Court for Alaska, Division No. 1, at Juneau.

THE UNITED STATES,

vs.

NICK GURVICH.

Defendant.)

No. 414-B.

Supersedeas Bond.

Know all men by these presents, that we, Nick Gurvich, as principal and George Keyruge and G. M. Janglar, as sureties, are held and firmly bound unto the United States of America, in the full sum of fifteen hundred Dollars, to be paid to the said United States of America, to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 2d day of March, A. D. 1904.

Whereas, lately at the December, 1903, term of the District Court of the United States for the District of Alaska, Division No. 1, in suit depending in said Court between the United States of America, plaintiff, and Nick Gurvich, defendant, a judgment and sentence was rendered against the said Nick Gurvich, and the said Nick Gurvich has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the suit aforesaid, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, State of California, on the 31st day of March, 1904, which citation has been duly served.

Now, the condition of the above obligation is such that if the said Nick Gurvich shall appear in the United States Circuit Court of Appeals for the Ninth Circuit on the said 31st day of March, 1904, to be held at the city of San Francisco, State of California, and from day to day and term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court

may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, shall be affirmed, then the above obligation shall be null and void, else to remain in full force, virtue and effect.

NICK GURVICH.

GEORGE KEYRUGE.

G. M. JANGLAR.

United States of America, }
 District of Alaska. } ss.

George Keyruge and G. M. Janglar, sureties who have subscribed the above and foregoing bond, being first duly sworn, each for himself, and not one for the other, depose and says: I am a resident and householder of the District of Alaska, and am not an attorney or counsellor at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court, and am worth the sum of fifteen hundred dollars, over and above all my debts and liabilities and exclusive of property exempt from execution.

G. M. JANGLAR.

GEORGE KEYRUGE.

Subscribed and sworn to before me this 2d day of March, A. D. 1904.

[Notarial Seal]

J. H. COBB,

Notary Public in and for Alaska.

[Endorsed]: Supersedeas Bond. Filed Mar. 17, 1904.
 F. D. Monckton, Clerk.

In the United States District Court for the District of Alaska,
Division No. One.

UNITED STATES }
 } vs. }
NICK GURVICH, }

**Opinion on Application of Defendant for Writ of Error and
Supersedeas Bond.**

This prosecution was brought under section 478 of Carter's Code, which provides that no licensee in any place shall knowingly sell or permit to be sold in his establishment any intoxicating liquor of any kind to any person under the age of 21 years, under the penalty upon due conviction thereof of forfeiting such license, and no person so forfeiting his license shall again be granted a license for the term of two years.

It will be observed that the only penalty attached to the offense here charged; namely, selling liquor to persons under 21 years of age, is the forfeiture of the license theretofore granted. Suppose the Court has not erred in the trial of this case and the defendant is permitted to give a supersedeas bond and the proceedings of this court on review by the court of errors should be affirmed; still the licensee would continue the business he is now engaged in and the term over which the license runs would expire before this case can be presented to the Appellate Court and the question of error

determined by that court. Thus the section of the statute under such conditions would become nugatory and the defendant escape the penalty attached to his act simply by giving this bond and by taking his case to the Court of Appeals. Is it possible that the Congress of the United States intended that their act punishing this offense, if it can be called a punishment, should be made nugatory and avoided by the act of the person who shall violate the terms of his license? I cannot so construe the statute.

Under the law providing for licenses, section 465 provides that the party desiring a license shall file a petition and shall set forth the various matters stated in the first, second, third, fourth, fifth and sixth subdivisions of said section. Section 466 provides that under a license issued in accordance with this act no intoxicating liquors shall be sold, given or in any way disposed of to any minor or intoxicated person or to an habitual drunkard. The duty of issuing licenses devolves upon the court or Judge. (See Sections 464-5-7.)

Under our statute the Judge of this court deemed it necessary to print across the face of the licenses the conditions under which they were issued and the prohibitions of the statute were endorsed or printed across the face of the license in red ink so that everyone obtaining the same might see and understand; and among the conditions it was stated that no intoxicating liquors should be sold or given or in anywise disposed of to any minor, Indian or intoxicated person or to an habitual drunkard, and that no female or minor or person

convicted of crime should furnish or distribute any intoxicating liquors to any person or persons.

Section 473 provides that any person having obtained a license under this act who shall violate any of its provisions shall upon conviction of any violation, be fined," etc., etc.

It will be observed that subdivision 5 of section 465 provides that the party applying for a license shall state that he intends to carry on such business for himself and not as an agent of any other person, and if so licensed he will carry on such business for himself and not as agent for any other person.

The issuing of licenses or persons to whom issued and the conditions under which issued are matters to be determined by the Judge or the court, as well as depriving a party to whom a license has been issued of the same for the violation of its terms. Under the peculiar law we are required to enforce, I am of the opinion that the procedure under section 478 and the trial thereby provided for, is a proceeding to inform the court or Judge as to whether the person who has received a license is violating the terms or permitting to be violated the terms thereof so that he may set aside and have forfeited the license before issued; that it from such procedure the Court is of the opinion that the person to whom license has been issued is an improper one to conduct the liquor business that it is a matter wholly for the Court to set his license aside and that no appeal or error lies from the Court's decision, but I will allow the writ of error in this case in order

that the higher court may pass upon the matter, but I decline to accept the supersedeas bond.

Dated, Juneau, March 1st, 1904.

M. C. BROWN,
Judge.

[Endorsed]: No. 414-B. United States vs. Nick Gurvich. Opinion on Application of Defendant for Writ of Error and Supersedeas bond. Filed Mar. 14, 1904, as of March 1, 1904. W. J. Hills, Clerk.

United States of America,
First Division,
District of Alaska.

The above is a true copy of opinion on application of defendant for writ of error and supersedeas bond made by the above court on the 1st day of March, 1904.

Witness my hand and the seal of said Court this 14th day of March, 1904.

[Seal]

W. J. HILLS,
Clerk.

By J. J. Clarke,
Deputy.

[Endorsed]: No. 1046. United States Circuit Court of Appeals for the Ninth Circuit. Nick Gurvich vs. The United States of America. Opinion on Application of Defendant for Writ of Error and Supersedeas Bond. Filed March 21, 1904. F. D. Monckton, Clerk.

This record continued at page 107